Supreme Court, U. S.
FILED
DEC 16 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

77-
No. 717

CHARLES GROSS,

Petitioner,

—v.—

NEWBURGER, LOEB & Co., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, WALTER D. STERN and ROBERT L. STERN, as Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, SANFORD ROGGENBURG, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman) and NEWBURGER, LOEB & Co., INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION OF CHARLES GROSS ON BEHALF OF ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, WALTER D. STERN AND ROBERT L. STERN, AS EXECUTORS OF THE ESTATE OF LEO STERN, ROBERT L. STERN, RICHARD D. STERN, AND SANFORD ROGGENBURG

OSMOND K. FRAENKEL
Attorney for above named Respondents
Office & P. O. Address
120 Broadway
New York, N. Y. 10005
(212) 349-4141

TABLE OF CONTENTS

PAGE

Argument 2

Conclusion 5

Authorities

ABC-Paramount Records, Inc. v. Topps Record Distributing Co., 374 F.2d 455 (5th Cir. 1967) 4

General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430 (1932) 2

Kelite Products, Inc. v. Binzel, 224 F.2d 131 (5th Cir. 1955) 4

Marconi Wireless Telegraph Co. v. National E. S. Co., 206 Fed. 295 (E.D.N.Y. 1913) 2

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 3, 4

Statutes and Rules

15 U.S.C. 77a, 78aa 2

28 U.S.C. 1331 2

28 U.S.C. 1441 ..... 2, 3

Federal Rules of Civil Procedure 13 ..... 2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 717

CHARLES GROSS,

Petitioner,

—v.—

NEWBURGER, LOEB & Co., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, WALTER D. STERN and ROBERT L. STERN, as Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, SANFORD ROGGENBURG, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman) and NEWBURGER, LOEB & Co., INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION OF CHARLES GROSS ON BEHALF OF ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, WALTER D. STERN AND ROBERT L. STERN, AS EXECUTORS OF THE ESTATE OF LEO STERN, ROBERT L. STERN, RICHARD D. STERN, AND SANFORD ROGGENBURG

Petitioner's contentions do not seem to us to raise any issues worthy of consideration by this Court.

ARGUMENT

1. Petitioner would have this Court reverse the rule unbroken for more than sixty years* that a "permissive" counterclaim must have an independent basis of federal jurisdiction. For the tremendous increase in the work of the federal courts that would result, petitioner is unable to find any statutory justification.

Petitioner's suggestion (pp. 24-26) that the Constitution and statutes speak of "cases" and "action" and, except in Rule 13, make no reference to counterclaims is correct, but gets him nowhere. For the statutes also speak of "matter in controversy" (28 U.S.C. 1331) or "claim" (28 U.S.C. 1441, subds. b and c), of "offenses and violations" of certain laws (15 U.S.C. 77a, 78aa). In each instance these words are tied to federal issues only.

There is, therefore, nothing in the statutory scheme, except Rule 13, that relates to counterclaims or suggests that they should be treated in any different way than if brought as part of an original suit.

Rule 13 (modeled on the old Equity Rule 30) distinguishes between "compulsory" and "permissive" counterclaims. If the principle now contended for by petitioner had any merit there would have been no need for the distinction. A simple statement that a defendant would be barred from subsequently raising any counterclaim available to him if it arose out of the transaction in the complaint would have been enough to accomplish the purpose

* See *Marconi Wireless Telegraph Co.* v. *National E. S. Co.*, 206 Fed. 295 (E.D.N.Y. 1913); *General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U.S. 430, 434 (1932).

of subdivision (a). Subdivision (b) could have been omitted altogether.

The word "claim" contained in subdivision (b) has, therefore, properly been construed to mean a claim otherwise subject to the jurisdiction of the federal court, as the word is, for instance, used in 28 U.S.C. 1441(b).

Petitioner's argument (pp. 18, 19, 31) that Gross's claim for the return of his capital should be tied together with his claim for conversion perhaps proves too much. Indeed it really supports the position we took below that the federal courts had no jurisdiction of any of the counterclaims except the Ninth (based on the Sherman Act), which was dismissed on the merits (see A. 48-51). That position is being very persuasively presented to this Court by the petition of Finley, Kumble, Docket 727, with which we agree.

The reliance on *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (pp. 25-29) is misplaced. The stress there (p. 725) was on the federal and state claims being "but one Constitutional 'case'." Or, as then stated, they "must derive from a common nucleus of fact." Here Gross's claim for the return of his capital had nothing whatever to do with his claim of conversion of his warrants. Indeed, the judgment of the District Court treated them differently: only the law firm, Newburger, Loeb & Co., Inc., and a few individuals were held liable for the conversion while the judgment for the capital went also against all the individual members of Newburger, Loeb & Co. (D. 2, D. 3). There was, therefore, no identity sufficient to justify application of *Gibbs*.

We venture to suggest that if the claim for the capital had original federal jurisdiction because some law of the United States might have been involved, the claim for conversion could not properly have been considered pendent under *Gibbs*.

2. Petitioner's argument with respect to punitive damages (pp. 31-33) proceeds upon an entirely false premise. As clearly appears from the District Court opinion (B. 21, 22), it awarded punitive damages, not because of any inherent power to protect the integrity of the Court, but because it found that a series of acts, most of which had no relation to the Court whatever, constituted a "gross departure from moral behavior" (B. 22).

In none of the cases cited (p. 32) was any question of punitive damages involved.

The position taken by the Court of Appeals that state law should be applied is not unique. The same rule was adopted by the Fifth Circuit in a case arising in Alabama: *Kelite Products, Inc.* v. *Binzel*, 224 F.2d 131, 143-145 (1955). To like effect is *ABC-Paramount Records, Inc.* v. *Topps Record Distributing Co.*, 374 F.2d 455, 462 (5th Cir. 1967) —a Florida case.

There is no reason why this Court should consider this issue.

CONCLUSION

The petition of Charles Gross should be denied.

Respectfully submitted,

OSMOND K. FRAENKEL
Attorney for Respondents Andrew M. Newburger, Robert L. Newburger, Robert L. Stern, Richard D. Stern and Walter Stern as Executors of the Estate of Leo Stern, Robert L. Stern, Richard D. Stern, and Sanford Roggenburg